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ATTORNEYS FOR THE CITY OF POCATELLO

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

In the Matter of the Petition for Delivery Call of A&B Irrigation District for the Delivery of Ground Water and for the Creation of a Ground Water Management Area	))))))	DOCKET NO. 37-03-11-1 **POCATELLO'S RESPONSE TO A&B'S MOTION FOR DECLARATORY RULING**

The City of Pocatello ("Pocatello") hereby submits this *Response to A&B's Motion for Declaratory Ruling.*

INTRODUCTION

A&B Irrigation District ("A&B") moved, pursuant to Rules 260 and 565 of the Idaho Department of Water Resources' ("IDWR") Rules of Procedure (IDAPA 37.01.01 *et seq.*), for a declaration that it is exempt from certain provisions of Idaho's 1951 Ground Water Act[1] ("Ground Water Act" or "Act"); *A&B's Motion for Declaratory Ruling* at 1, March 21, 2008 ("*A&B Motion*"). A&B specifically seeks to avoid application of the reasonable pumping level provision of I.C. § 42-226 ("section 226"):

> Prior appropriators of underground water shall be protected in the maintenance of *reasonable ground water pumping levels* as may be established by the director of the department of water resources as herein provided.

(Emphasis supplied). A&B argues it is exempt from the "reasonable ground water pumping levels" provision because, in 1987, the legislature added the following phrase to section 226: "[t]his act shall not affect the rights to the use of ground water in this state acquired before its enactment." *A&B's Motion* and *A&B's Memorandum in Support of A&B's Motion for Declaratory Ruling*, March 21, 2008 (references to A&B's Memorandum are found within as "*A&B Brief*"). As we argue within, this is an erroneous construction of the Idaho Ground Water Act, and A&B's claims for relief must fail.

A&B's position argued in its papers appears to be a renewal of the "shut-and-fasten" administration long sought by the Surface Water Coalition ("SWC") in its

[1] As a practical matter, it appears A&B also intended to move pursuant to IDAPA 37.01.01.400, .401, and .402, which provide authority for the agency (and its delegated authority in this matter—the Hearing Officer) to decide requests for declaratory relief. A decision in this matter is final agency action under the Idaho APA, and may be appealed to the District Court. IDAPA 37.01.01.402.02.b.

delivery call case. A&B equates declines in its "historic water levels" with injury, much as the SWC equated injury to its water rights from a failure to have available decreed rates of diversion. "Shut-and-fasten" administration was rejected as the law in Idaho when the Supreme Court in *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Res.*, 143 Idaho 862, 154 P.3d 433, 445 (2007) ("*AFRD #2*") upheld the facial constitutionality of the Rules of Conjunctive Management of Surface & Ground Water Resources ("CMR") which require an analysis under CMR Rule 42 before a finding of injury. IDWR acted properly in its January 29, 2008 Order ("*Order*") by relying on the CMR to perform an injury analysis, rather than simply relying on A&B's assertion that depletion of its historic water levels equates to injury. *See, inter alia.*, *Order* at Finding Of Fact ("FOF") 35-95 and Conclusion Of Law ("COL") 21 and 38.

Nonetheless, in its motion, A&B argues that it is entitled to "historic water levels" regardless of the fact that this entitlement would create a kind of "super" ground water right that was not even available to appropriators at common law. In making these arguments, A&B also disregards the language of section 226 of the Ground Water Act, and the Idaho Supreme Court decision *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584 513 P.2d 627, 636 (1973)("*Ore-Ida*"), which construed the Ground Water Act (including the provision A&B seeks to avoid) to apply "reasonable pumping levels" (rather than historic water levels) to irrigation ground water rights senior to 1951.

This brief first describes the development of ground water law in Idaho which contains no decisions establishing a *per se* right to any particular water level. With the adoption of the Ground Water Act, *Ore-Ida* is controlling in this dispute, and demonstrates that the Idaho Supreme Court has, to date, declined to apply the section 226

language to create the sort of exemption from reasonable pumping levels argued for by A&B.

Second, the brief describes the component parts of the Ground Water Act, and concludes that the broad exemption sought by A&B is inconsistent with the language of that statute, particularly insofar as the Ground Water Act vests broad discretion in the Director of IDWR ("Director") to determine whether an available supply of ground water is sufficient to meet prior and subsequent appropriators.

The wholesale exemption from the application of "reasonable pumping levels" under section 226 sought by A&B in this matter is not provided for in the Ground Water Act nor elsewhere, and A&B's request for declaratory relief must fail.

MATERIAL FACTS RELEVANT TO THE DISPUTE

A&B lists a number of facts it claims are "material" and to which "no genuine issue has been raised". *A&B Brief* at 5-6. Given the status of the proceedings, it is unsurprising that "no genuine issues have been raised" regarding these facts. Discovery has scarcely begun and recitation of facts by IDWR in the *Order*, which found A&B had not been materially injured, does not, in and of itself, make the facts "material" for purposes of A&B's Motion.

What follows is a synopsis of A&B's asserted material facts from its brief. Where appropriate, Pocatello has indicated its dispute with regard to A&B assertions of "material fact".

1. A&B is entitled to divert 1100 cubic feet per second of ground water from the ESPA to irrigation 62,604.3 acres of land. *A&B Brief* at 5.

    a. Pocatello agrees that it is material that A&B's water right is for irrigation uses.

b. Pocatello disputes the assertion that A&B is entitled to 1100 cfs in a delivery call for the purposes of curtailing junior ground water rights if it cannot demonstrate that it requires 1100 cfs for beneficial uses.

2. A&B has a priority date of September 9, 1948. *A&B Brief* at 5.

   a. Given that section 226 of the Ground Water Act qualifies all ground water rights (except those appropriated for domestic uses or wells drilled for drainage purposes) by limiting their entitlement only to "reasonable pumping levels", A&B's priority date is not material.

3. The ESPA is hydraulically connected and has a common ground water supply. *A&B Brief* at 5.

   a. Pocatello agrees this is a material and undisputed fact.

4. The ESPA has experienced reductions in ground water levels since 1950. *A&B Brief* at 5.

   a. This fact is not material for purposes of A&B's motion.

5. IDWR has created or attempted to create Water Districts Nos. 100, 110, 120, 130, and 140. *A&B Brief* at 5.

6. There has been no curtailment of out-of-priority diversions to protect A&B's historic pumping levels. *A&B Brief* at 5-6.

   a. This is a fact, but it is only material if the Hearing Officer determines that A&B's entitlement to water levels is measured by reference to the cases of *Noh* and *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982) ("*Parker*"), rather than section 226 of the Ground Water Act and *Ore-Ida*.

7. A&B has expended certain amounts of money for well "rectification". *A&B Brief* at 6.

   a. Whether this fact is material is in dispute.

8. A&B has experienced a reduction in its diversion capacity of 12%. *A&B Brief* at 6.

   a. This "fact" is disputed by Pocatello and, in any event, is irrelevant to the resolution of this motion.

I. THE RELIEF SOUGHT BY A&B IS NOT VESTED IN THE COMMON LAW, AND SHOULD BE REJECTED OUT OF HAND AS A CONCEPT ABERRANT TO IDAHO LAW.

The nub of *A&B's Brief* is whether A&B is *per se* entitled to "historic water levels". A&B frames its argument by suggesting that 1) until the adoption of I.C. § 42-226, the law entitled ground water appropriators to maintenance of historic water levels; 2) that only ground water appropriations made subsequent to promulgation of I.C. § 42-226 are subject to its "reasonable pumping levels" provisions; and 3) that the phrase "early appropriators of underground water shall be protected in the maintenance of reasonable pumping levels as may be established by the director of the department of water resources as herein provided" exempts pre-Act ground water rights from the "reasonable pumping level" provisions. *See generally, A&B's Motion and Brief.*

However, this argument assumes that ground water appropriators ever had an entitlement to particular water levels. In fact, none of the early cases discussed in *A&B's Brief* (*see,* pages 14-24) stand for the proposition that a senior ground water appropriator is entitled *per se* to maintenance of any particular level of ground water. Rather, when considering the question of water levels, all Idaho Supreme Court decisions (pre-Ground Water Act and post-Ground Water Act) have explicitly or implicitly included a threshold finding by the trial court that the senior's water rights suffered material injury. There was no *per se* entitlement to particular levels of ground water at common law, and there is not one today.[2]

In framing its argument as "either-or" (either A&B is entitled to historic water levels or it is entitled to "reasonable pumping levels") A&B is putting the cart before the

[2] *Nampa & Meridian Irr. Dist. v. Petrie*, 37 Idaho 45, 223 P. 531, 532 (1924) ("*Nampa*") seems to dispose of a *per se* right to a particular water level. *See also*, Hutchins, *Idaho Law of Water Rights*, 5 IDAHO L. REV. No. 1, 118 n.521 (1968).

horse. Until A&B demonstrates it has suffered material injury by reference to the standards in the CMR, as called for by the *AFRD #2* decision, the issue of water levels doesn't even arise. If it can make out a case of injury, the Director is then authorized to make a "reasonable pumping level" inquiry. I.C. § 42-226.

Perhaps the most prominent pre-Ground Water Act case, *Noh*, did not find a *per se* entitlement to ground water levels. Rather, after noting the district court's finding that pumping of the juniors' wells lowered the water table "to such an extent that [the seniors'] pumps were dry"[3], the Court posed the question of whether the senior was entitled to continue his *means of diversion.*[4] 26 P.2d. at 1112-13. The *Noh* Court found that the burden to avoid interference with the seniors' rights was on the junior. *Id.*

By contrast, *A&B's Brief* raises the same legal argument apparently made by the defendant Blucher in the decision of *Nampa & Meridian Irrigation Dist. v. Petrie,* 37 Idaho 45, 223 P. 531 (Id. 1923)("*Nampa*")[5]. *Nampa* involved a dispute over the proportionality of assessments in a new irrigation district. *Id.* Blucher's apparent objection to the assessment was that the new irrigation district had in some way disturbed the historic ground water levels associated with his well and, as such, had interfered with an element of his ground water right. *Id.* at 531-32:

> If it should be conceded that appellant Blucher's use of the subterranean waters, as shown by the evidence, gave him a valid water right, nevertheless the additional water right furnished for his land under the contract would be a sufficient benefit to the land to justify the assessment

[3] This is also true of post-Ground Water Act cases, including *Ore-Ida*, which involved findings of the trial court that the sub-basin from which the wells were pumping was in a "mining" condition. 513 P.2d 627. Additionally, *Parker*, like *Noh*, involved a situation where pumping of a junior irrigation well eliminated the senior's (domestic) water supply.

[4] The Court found implicitly that the junior's wells, drilled to depths below those of the senior, were causing a reduction in the seniors' historic water levels. 26 P.2d at 1114 ("[i]n the instant case, the body of water tapped by respondents' and appellants' wells is depleted perpendicularly by appellants' wells.")

[5] Note that this case is no longer good law for the issue of irrigation district liability. *Stephenson v. Pioneer Irrigation Dist.*, 49 Idaho 189, 288 P. 421 (1930).

> made. We conclude, however, that he had no right to insist the water table be kept at the existing level in order to permit him to use the underground waters...To hold that any landowner has a legal right to have such a water table remain at a given height would absolutely defeat drainage in any case, and is not required by either the letter or spirit of our constitutional and statutory provisions in regard to water rights.

Id. at 532. The Court rejected a *per se* entitlement to water levels and even found that such an entitlement would offend the Idaho constitution. *Id.* A&B's arguments that it has a legal entitlement to any particular water level are similarly without legal basis, even under the common law.

II. *ORE-IDA* ARTICULATES THE CURRENT STATE OF THE LAW AND, AS SUCH, SECTION 226 OF THE GROUND WATER ACT IS APPLICABLE TO A&B.

In *Ore-Ida* the Idaho Supreme Court interpreted section 226 of the Ground Water Act in the context of a dispute involving water rights senior to 1951. 513 P.2d at 627, fn 1. This is the only case decided by the Supreme Court that has specifically construed section 226, and the Court did not interpret section 226 to exempt ground water rights with priority dates senior to the adoption of the Ground Water Act. However, as this case appears to have involved a dispute over well pumping in a "critical ground water management area"[6] the Supreme Court did not apply section 226 to require establishment of a "reasonable pumping" level.

Ore-Ida involved defendant Ore-Ida's appeal from the district court's injunction barring pumping of its junior ground water rights. *Id.* at 628-29. In affirming the trial court, the Court first reviewed the common law, including its decision in *Noh*, noting that

[6] The Court never uses the term "critical ground water management area". However, it found that the aquifer in question was being "mined", a condition prohibited under the Ground Water Act, and a condition precedent under the Act for formation of a critical ground water management area. *See, Baker v. Ore-Ida* at 628-630, and 635 (discussing trial court's findings regarding "mining" of the aquifer in question). *Compare also* Attachment 1, paragraph 3, which references a district court decision finding 5500 acre-feet of annual recharge for the aquifer in question with a nearly identical reference in *Ore-Ida* at 630.

"[a]pparently the [adoption of the] Ground Water Act was intended to eliminate the harsh doctrine of *Noh*." *Id.* at 634. Thus, to the extent *Noh* was emblematic of the common law rule prior to the adoption of the Ground Water Act, the Court found that the legislature had abrogated the common law by adoption of the Act. *Id.* at 635. The Court declared:

> that in some situations senior appropriators may have to accept some modification of their rights in [o]rder to achieve the goal of full economic development" and "the legislature has said that when private property rights c[l]ash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is the promotion of the welfare of all our citizens.

Id. at 636.

Ore-Ida argued that because the senior was only entitled to "reasonable pumping levels" the injunction was improper. *Id.* The Court agreed with this analysis and elaborated:

> A senior appropriator is only entitled to be protected to the extent of the 'reasonable ground water pumping levels' as established by the IDWA. I.C. s. 42-226. A senior appropriator is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.

Id. However, said the Court: "our agreement [with Ore-Ida's parsing of section 226] avails appellants nothing because the trial court found the aquifer's water supply inadequate to meet the needs of all appropriators."[7] *Id.*

Although the factual context precluded application of section 226 in *Ore-Ida*, the Court's analysis provides the link between the "reasonable pumping level" limitation in

[7]"We now hold that Idaho's Ground Water Act forbids 'mining' of an aquifer. The evidence herein clearly shows that the pumping by all parties was steadily drawing down the water in the aquifer at the rate of 20 ft. per year. Since our statute explicitly forbids such pumping, the district court did not err in enjoining pumping beyond the 'reasonably anticipated average rate of future natural recharge.'" *Ore-Ida* at 635.

I.C. § 42-226 and the constitutional principles of full economic and optimum development as codified by the Ground Water Act. *Id*[8]. Under the Ground Water Act, as affirmed by *Ore-Ida*, unless a ground water right is specifically exempted from the Act under I.C. § 42-229, seniors are entitled only to "reasonable pumping levels", and only after a showing of injury.[9]

A. A&B's reliance on *Parker* is unpersuasive.

Parker does not aid A&B's arguments. The circumstances in the A&B delivery call are not like those in *Parker*, and the Supreme Court's decision in *Parker* is limited to its facts which involved claims of injury to a domestic ground water right-holder. *Parker v. Wallentine,* 103 Idaho 506, 650 P.2d 648, 649 (1982). The Court's opinion in *Parker* is framed in the context of the Ground Water Act's exclusion of a domestic well from *any* regulation under the Ground Water Act until the 1978 amendments to section 227, which required domestic wells to appropriate their water via the permit system. *Id.* at 651-52. The Court in *Parker* relied on the fact that: 1) domestic wells were expressly exempted from *all* provisions of the Ground Water Act; and thus 2) the only provisions that domestic wells are subject to are those found in amended section 227 which eliminated the constitutional method of appropriation as a means to appropriate a domestic water right. *Id.* As such, Parker was entitled to historic water levels.[10] *Id.* at 654.

The Court framed these holdings not by reference to the language A&B highlights from section 226 ("[t]his act shall not affect the rights to the use of ground water in this

[8] "We hold that the Ground Water Act is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest. Idaho Const. art. 15, s 7. Full economic development of Idaho's ground water resources can an[d] will benefit all of our citizens."
[9] *See also*, In the Matter of Applications to Appropriate Water Nos. 63-32089 and 63-32090 in the Name of the City of Eagle, Final Order, February 26, 2008 at Conclusions of Law ¶¶ 17-22.
[10] In the latter part of its decision the Court relented slightly and held that Wallentine was authorized to take steps to ensure that Parker had his water right, including providing a new means of diversion, provided that the result did not injure Parker. *Id.* at 514.

state acquired before its enactment") or to the continued vitality of the *Noh* decision in the context of irrigation rights. Instead, the Court noted that defendant Wallentine's junior well interfered with plaintiff Parker's domestic water right, and that section 227 of the Ground Water Act affirmatively exempted domestic wells from regulation under the Ground Water Act. As such, *Noh* applied in Parker's situation because Parker's well was not regulated by the Ground Water Act. *Id.* at 654 fn. 11. In this way, the *Parker* Court carefully harmonized its ruling with that of *Ore-Ida*. Simply put, unless the right is a domestic right, *Ore-Ida* controls.

B. *Musser v. Higginson* does not control the interpretation of section 226 called for under A&B's motion.

Like *Parker*, the Court's opinion in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994)("*Musser*"), must be limited to its facts. *Musser* was a case involving the propriety of the Director's response to Musser's request for delivery of water and whether the writ, issued by the trial court, should be affirmed. It was not a case that wrestled with the Ground Water Act.

The Supreme Court rejected the Director's arguments that the writ was in error, focusing on the Idaho law standards for issuing a writ in light of a failure of agency action. *Id.* at 395. The fact that an agency has discretion to act is not a defense to a writ. *Id.* The Court specifically rejected the Director's reliance on an IDWR policy based on section 226 that "a decision has to be made in the public interest as to whether those who are impacted by ground water development are unreasonably blocking full use of the resource." *Id.* at 396. It, noted that the "original version and the current [Ground Water Act] make it clear that this statute does not affect the rights to the use of ground water

acquired before the enactment of this statute" and thus the Director had no basis under section 226 to decline to deliver Musser's April 1, 1892 *surface* water right. *Id.*

A&B relies on this quote to assume the predicate: the Court's mention of section 226 in Musser means that A&B, and similarly situated ground water rights that pre-date the Ground Water Act, are exempt from the "reasonable pumping level" standard found in section 226. However, absent a more thorough-going analysis to distinguish *Ore-Ida*, which found the applicability of "reasonable pumping levels" to pre-Ground Water Act ground water rights, it is unwarranted to read *Musser* to reverse *Ore-Ida*.

III. THE LANGUAGE OF THE GROUND WATER ACT AND ITS AMENDMENTS DOES NOT SUPPORT A&B'S POSITION THAT IT IS EXEMPT FROM THE GROUND WATER ACT

A&B erroneously relies on the language of section 226 of the Ground Water Act—as well as the amendments thereto over the years—for the proposition that it can avoid the "reasonable pumping level" provisions of section 226. The language of the Ground Water Act itself, the amendments to the Act, and the legislative history do not support A&B's arguments.

The rules of statutory interpretation require that a statute be construed as a whole, with all sections read together, and not each section in a vacuum individually. *Friends of Farm to Market v. Valley County,* 137 Idaho 192, 46 P.3d 9, 15 (2002); *Sherwood v. Carter,* 119 Idaho 246, 805 P.2d 452, 460 (1991).

A. The Ground Water Act applies to all ground water rights, regardless of their priority date, unless the legislature specifically exempted a class of ground water uses from the Act.

Section 229 confirms that the Ground Water Act and its regulatory provisions are intended to apply to all ground water rights. Section 229 mandates that all ground water rights, whatever their provenance, are subject to the Ground Water Act:

> But the administration of ***all rights*** to the use of ground water, ***whenever*** and however ***acquired*** or to be acquired, ***shall***, unless specifically excepted herefrom, ***be governed by the provisions of this act.***

This leaves little doubt that all ground water rights are subject to the Ground Water Act, unless specifically exempted.

The Ground Water Act contains two specific exemptions, set out in sections 227 and 228. Section 227 specifically exempts domestic wells; section 228 specifically exempts wells drilled for drainage or recovery purposes. A&B's rights are not subject to the exceptions to the Ground Water Act enacted in sections 227 and 228. Because section 229 specifically subjects their rights (along with all other ground water rights) to regulation under the Ground Water Act, it is the duty of the Hearing Officer is to read the statutory sections of the Act in harmony in the administration of ground water rights. If the legislature had wanted to exempt pre-1951 ground water rights from the provisions of the Ground Water Act, it would have specifically done so.

B. Section 226 and its amendments do not create any exemption to the requirements of the Act.

Section 226 of the Ground Water Act as originally adopted stated:

> It is hereby declared that the traditional policy of the State of Idaho, requiring the water resources of this sate to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined. All ground waters in this state are declared the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. *All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.*

1951 Idaho Sess. Laws, ch. 200, §1, p. 423 (approved Mar. 19, 1951) (emphasis added). In 1953, the legislature amended §42-226, adding the underlined language below:

> It is hereby declared that the traditional policy of the State of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the

> ground water resources of this state as said term is hereinafter defined and, while the doctrine of "first in time is first in right" is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided. All ground waters in this state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same for beneficial use. *All rights to the use of ground water in this state however acquired before the effective date of this act are hereby in all respects validated and confirmed.*

1953 Idaho Sess. Laws, ch. 182, §1, p. 278 (approved Mar. 12, 1953) (emphasis added).

Finally, the legislature again amended §42-226 of the Ground Water Act in 1987 to address concerns involving the administration of rights to the use of low temperature geothermal ground water resources.[11] The 1987 amendment also amended the last sentence of the first paragraph of §42-226 to read as follows:

> ~~All~~ This act shall not affect the rights to the use of ground water in this state ~~however~~ acquired before ~~the effective date of this act are hereby in all respects validated and confirmed~~ its enactment.

1987 Idaho Sess. Laws, ch. 347, §1, p. 743.

Today, section 226 provides, *inter alia*:

- The prior appropriation doctrine applies to ground water in Idaho;
- The "reasonable exercise of this right [of prior appropriation] shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the state reclamation engineer as herein provided"; and
- The Act shall not "affect the rights to the use of ground water in this state acquired before its enactment."

[11] The legislature added the following language to §42-226: "In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extend that he determines such protection is in the public interest." 1987 Idaho Sess. Laws, ch. 347, §1, p. 743.

A&B suggests that this last sentence somehow guarantees a right to "historic water levels" and exempts them from the "reasonable pumping level" provision of section 226. In fact, this sentence merely confirms that the rights to the use of ground water acquired by appropriators constitutionally or by permit need not be re-adjudicated or re-permitted. Far from creating an exemption from the Ground Water Act, this provision by its terms was designed to incorporate pre-Ground Water Act ground water rights into the regulatory structure of the Ground Water Act.

C. The remaining provisions of the Ground Water Act read together with section 226 do not support the contention advanced by A&B—that they are the holders of a "super" ground water right that would effectively supersede the constitutional doctrines of "full economic development" and "optimum use".

Taken together, the Act's various provisions cannot be read to create a "super" ground water right of the kind sought by A&B that is exempt from the provisions of the Ground Water Act by reference to its priority date. An examination of the following relevant sections of the Ground Water Act, when read together, shows that A&B's argument must fail.

- Section 233a. This section describes the discretion of the Director upon receipt of an application for a permit to pump ground water in either a critical ground water management area or other areas of the state.
  - In a critical ground water management area, the Director continues to be authorized to conduct an investigation regarding available supply and to grant the permit with or without conditions or deny the permit. In a critical ground water management, a legal entitlement to historic water levels would seem to foreclose new permits. The fact that the Director is authorized to grant ground water permits at all in a critical ground water management area is inconsistent with any inchoate right of A&B to "historic water levels".
  - In a non-critical area, the Director is authorized to determine whether to issue the permit based on whether the withdrawal will "substantially and adversely affect existing pumping levels of appropriators". The use of the term "existing pumping levels" rather than "historic water levels" is consistent with the argument that the "reasonable pumping levels" provision of section 226 is

applicable to all ground water rights except domestic rights acquired before 1978.

- Section 233b. Applications for ground water permits in a ground water management area may be granted by the Director only after a determination "on an individual basis that sufficient water is available and that other prior rights will not be injured." Again, this language does not aid A&B's "historic water levels" argument; to the contrary, if the Director has determined a "reasonable pumping level," then his determination of sufficiency of available water will be made on that basis and not any historic water level analysis.

- Section 237a. This section describes the discretion of the Director under the Ground Water Act. Relevant here is 42-237(a)(g) which provides that the Director

> may initiate administrative proceedings to prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available. To assist [in this administration]...[the director] may establish a ground water pumping level or levels in an area or areas having a common ground water supply...

Again, this would have been an appropriate place for the legislature to spell it out if there were indeed two classes of water rights—those subject to "reasonable pumping levels" due to post-Ground Water Act priority dates and those that were exempt due to pre-Ground Water Act priority dates. Yet there is no mention of limiting the Director's discretion by reference to the priority date of the rights.

- Section 239. The legislature provided the means to interpret the Ground Water Act:

> The executive and judicial departments of the state shall construe the provisions of this act, wherever possible in harmony with the provisions of title 42, Idaho Code, as amended; and nothing herein shall be construed contrary to or in conflict with the provisions of article 15 of the Constitution; and except where otherwise provided in this act, the provisions of said title 42, Idaho Code, as amended shall continue to govern ground water rights in this state.

If the legislature had intended to create a class of "super" ground water rights, for rights with priority dates prior to the enactment of the Ground Water Act, this would have been an opportune place to make that statement and clarify the interpretive direction provided.

CONCLUSION

A&B seeks a judicial declaration that it is exempt from the "reasonable pumping level" provisions of I.C. 42-226 and that its water right is entitled to maintenance of "historic water levels" due to its 1948 priority date. As a threshold matter, the entitlement sought by A&B does not seem to have existed at common law. The adoption of the Ground Water Act codified the legislature's understanding of the relationship between ground water levels and ground water rights through I.C. 42-226. The language of section 226, as well as case law interpreting that section and the Act generally, suggests that there is no basis for exempting A&B from the provisions of I.C. 42-226. Further, there is no basis in case law or the Ground Water Act to provide A&B the protections afforded pre-1978 domestic water rights in *Parker*.

Pocatello respectfully requests that A&B's Motion for Declaratory Ruling be denied. Pocatello further requests that the Hearing Officer, in his ruling, acknowledge that a decision on A&B's motion is final agency action for purposes of appeal to the district court and the Idaho Supreme Court.

Respectfully submitted, this 14th day of April, 2008.

CITY OF POCATELLO ATTORNEY'S OFFICE

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CERTIFICATE OF SERVICE / MAILING

I hereby certify that on this 14th day of April, 2008, **Pocatello's Response to A&B's Motion for Declaratory Ruling** was served by email and/or by placing a copy in the U.S. Mail, postage prepaid and addressed to the following:

Sarah A. Klahn, White & Jankowski, LLP

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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF GROUND WATER)
WITHDRAWAL IN THE COTTONWOOD) **ORDER**
CRITICAL GROUND WATER AREA)
)

The Director of the Department of Water Resources ("Director" or "Department") has the duties of protecting vested water rights, enforcing specific statutes of the State of Idaho, and enforcing rules promulgated by the Department. As part of these duties, the Director is authorized to order the cessation or reduction of ground water withdrawals within a critical ground water area.

Based upon the Department's investigation of ground water withdrawals and the sufficiency of the water supply to meet the demands for ground water under water rights within the Cottonwood Critical Ground Water Area ("Cottonwood CGWA") and his understanding of the law, the Director enters the Following Findings of Facts, Conclusions of Law, and Order.

FINDINGS OF FACT

1. On January 16, 1962, the Director established the Goose Creek – Rock Creek CGWA pursuant to Idaho Code § 42-233a. The Goose Creek – Rock Creek CGWA included the area that is currently known as the Cottonwood CGWA. On September 6, 1967, the Director modified the boundaries of the Goose Creek – Rock Creek CGWA by designating three separate CGWAs including the Cottonwood, Artesian City, and West Oakley Fan CGWAs. The Director designated the original Goose Creek – Rock Creek CGWA and the subsequent Cottonwood CGWA upon a determination that there was not a sufficient amount of ground water available to fill the water rights within the area at the then current rates of withdrawal.

2. In 1969, the United States Geological Survey ("USGS") published a report that estimated the total surface water yield for the hydrologic basin overlying the Cottonwood CGWA at approximately 10,000 acre-feet per annum (AFA). Of the 10,000 AFA, approximately 5,000 AFA is ground water recharge and about 5,000 AFA is surface water runoff. The USGS also estimated that about 15,000 acre-feet of ground water was withdrawn in the Cottonwood CGWA each year for irrigation. When the report was prepared, the annual rate of ground water withdrawal was three times the amount of annual natural recharge to the aquifer. Ground water levels in two separate observation wells within the Cottonwood CGWA declined at an average rate of about 20.5 feet per year, or a total average decline of 175 feet, between 1961 and 1970.

Attachment 1

3. On October 1, 1971, the Idaho Fifth Judicial District Court, Cassia County, adjudicated the water rights within the Cottonwood CGWA (Baker v. Ore-Ida, Civil Case No. 7876) ordering that water right holders in the area are:

> ... prohibited from removing more water than the average annual rate of natural recharge, which is fixed by this decree as 5,500 acre feet per year, and which may be subsequently fixed by the Department of Water Administration at a greater or lesser amount. After January 1, 1972, no water may be removed from the aquifer ... except through a well equipped with a meter approved by the Department of Water Administration.

4. On May 3, 1973, the Department created Water District No. 45-O, Golden Valley, pursuant to Idaho Code § 42-604. The water district boundaries were identical to the boundaries of the Cottonwood CGWA. The water district was created to provide for a watermaster to control withdrawal and distribution of water from the aquifer within the Cottonwood CGWA.

5. On June 25, 1980, the Idaho Fifth Judicial District Court, Cassia County, issued a judgment in Civil Case No. 9818 (Briggs v. Higginson), ordering that the average annual withdrawal from all irrigation wells in the Cottonwood CGWA shall not exceed 5,500 AFA during any consecutive five year period, and allowing each user to carryover the unused portion of any water right entitlement from the preceding year. The judgment further provided that:

> The Department may limit or expand the amount of water which may be pumped from the aquifer without exceeding its average annual rate of recharge in accordance with ... the Amended Decree made and entered on October 1, 1971, in said Civil Case No. 7876.

6. In 1984, the USGS published a report that revised the estimated ground water recharge in the Cottonwood CGWA to 4,000 AFA.

7. On January 4, 1985, the Director issued an order limiting the average annual withdrawal of ground water from the Cottonwood CGWA to 4,000 acre feet. The Director stayed the order on February 15, 1985, contingent upon the success of a managed ground water recharge project being implemented at that time. On January 15, 1987, the Director sent notice to holders of water rights in the Cottonwood CGWA advising them of a continued stay of the order of January 4, 1985, based on the apparent success of managed ground water recharge within the area. This latter notice further advised the right holders that the "January 4, 1985 order was stayed and not permanently set aside."

8. Between 1970 and 2003, ground water levels in the Cottonwood CGWA have declined about 80 feet, or an average rate of about 2.5 feet per year. One observation well maintained by the Department in the area shows a decline of about 50 feet between 1989 and 2003. According to records of the watermaster for Water District No. 45-O, ground water withdrawals in the Cottonwood CGWA have varied between 2,550 and 5,520 AFA between 1985 and 2003. Average annual ground water withdrawals from 2000 to 2003 were 4,763 AFA.

Ground water levels in several monitoring wells in the Cottonwood CGWA have declined about 20 feet between 2000 and 2003.

9. The watermaster for Water District No. 45-O has confirmed that there is currently no active managed ground water recharge being implemented in the Cottonwood CGWA. The Department has no record of any active managed recharge occurring in the Cottonwood CGWA since 1996.

10. On August 4, 2004, the Department sent correspondence to water right holders in the Cottonwood CGWA and Water District No. 45-O advising them that the Director was considering lifting the stay of the order of January 4, 1985, which would limit average annual ground water withdrawals to 4,000 acre-feet to bring average annual ground water withdrawals back in balance with average annual ground water recharge. Holders of ground water rights were requested to provide any data or information about recent or past managed recharge efforts and to provide an update regarding any future plans for managed ground water recharge. The Department also asked for comments or input regarding the proposed restriction of annual ground water withdrawals to 4,000 acre-feet. The Department received no response to this inquiry as of August 30, 2004.

CONCLUSIONS OF LAW

1. The Director has a statutory responsibility to administer the use of ground water in the State of Idaho in a manner that protects prior surface and ground water rights while allowing for full economic development of the state's underground water resources in the public interest. *See* Idaho Code §§ 42-226, 42-237a.g, and 42-602.

2. The Director has general responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts through watermasters supervised by the Director, as provided in chapter 6, title 42, Idaho Code and Department regulations.

3. The establishment of Water District No. 45-O, which includes all of the area included within the boundaries of the Cottonwood CGWA, provides the Director with the water administration authorities available under chapter 6, title 42, Idaho Code.

4. Idaho Code § 42-233a provides in pertinent part:

> The Director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or a portion of a critical ground water area, shall order those water right holders on a time priority basis, within the area determined by the Director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

5. The Fifth Judicial District Court of Idaho issued two judgments regarding the amount of annual ground water use in the Cottonwood CGWA. Civil Case No. 7876 dated October 1, 1971, and Civil Case No. 9818 dated June 25, 1980, both ordered that the Director may, by order, limit or expand the amount of water that may be withdrawn from the aquifer underlying the Cottonwood CGWA without exceeding its average annual rate of natural recharge.

6. The Department has determined, based on the USGS 1984 report, that the average annual rate of natural recharge in the Cottonwood CGWA is 4,000 acre-feet. Authorization of ground water withdrawals in excess of 4,000 AFA is not warranted given that ground water levels have further declined in the aquifer since 1980. The Director should limit annual ground water pumping in the Cottonwood CGWA to 4,000 acre-feet.

ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

1. The stay of the Director's order dated January 4, 1985, is hereby lifted.

2. The annual withdrawal of ground water for those water rights located within the Cottonwood CGWA and identified in the Water Right Delivery Schedule, Attachment A to this order, shall not exceed 4,000 acre-feet per year. This limitation applies only to those water rights listed in Attachment A and does not apply to existing water rights or uses of water for domestic and stockwater purposes as defined in Idaho Code § 42-111.

3. All diversions of ground water under those water rights identified on the Water Right Delivery Schedule in Attachment A shall be measured using flow meters or measuring devices of a type acceptable to the Department. The watermaster for Water District No. 45-O shall shut off and refuse to distribute water to any diversion in the water district that does not have an adequate measuring device.

4. The watermaster for Water District No. 45-O shall continue to monitor diversions of ground water during the irrigation season and shall regulate the diversions in accordance with the Water Rights Delivery Schedule in Attachment A.

DATED this 30th day of August, 2004.

KARL J. DREHER
Director

ATTACHMENT A

WATER RIGHT DELIVERY SCHEDULE
FOR THE COTTONWOOD CRITICAL GROUND WATER AREA

Priority	Water Right Number	Flow Rate (CFS)	Decreed Volume (AF)	Maximum Deliverable Volume (AF)	Owner
12-13-1948	45-2283	1.64			Joe Tugaw
01-16-1950	45-2322	3.33			Joe Tugaw
04-03-1959	45-2575	0.55	1,663*	1,663*	Joe Tugaw
04-29-1959	45-2578	3.56	978	978	Don McFarland
06-16-1959	45-2582A	1.99	474	474	Russell Patterson
06-16-1959	45-2582B	2.01	478	478	Russell Patterson
07-20-1959	45-2585A	3.19	714	206	Russell Patterson
07-20-1959	45-2585B	3.12	699	201	Russell Patterson
01-13-1960	45-2597		1,271	0	Don McFarland
Total			6,277	4,000	

*Rights 45-2283, 45-2322, and 45-2575 have a combined annual diversion volume limit of 1,663 acre-feet.

EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER
(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of: a) the service date of the final order, b) an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 30th day of August 2004, the above and foregoing document was served upon the following individuals by placing a copy of the same in the United States Mail, postage prepaid, certified as requested and properly addressed as follows using the attached list of names

USGS
230 COLLINS ROAD
BOISE ID 83702

S W IRRIGATION DIST
PO 668
BURLEY ID 83316

TUGAW RANCH
C/O JOE TUGAW
3277 WOODRIDGE DR
TWIN FALLS ID 83301

RUSSELL PATTERSON
1800 Z STREET
HEYBURN ID 83336

DON MCFARLAND
PO BOX 268
EDEN ID 83325-0268

Crystal N. Calais
Administrative Assistant
Water Distribution Section
Idaho Department of Water Resources